No. 80-1659

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JACK R. DUCKWORTH,
Petitioner,

vs.

RICHARD LEE OWEN, II,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Marcia L. Gienapp
Attorney for Respondent
Valparaiso University
School of Law
Valparaiso, Indiana 46383
(219)464-5420

QUESTION PRESENTED FOR REVIEW

Does the Seventh Circuit's decision, permitting post-verdict testimony from a juror when that is the only way to show that a defendant's Sixth and Fourteenth Amendment rights were violated by an extraneous prejudicial influence in the jury room, impermissibly conflict with the Indiana rule of evidence?

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STATEMENT OF THE CASE

Course of Proceedings

After a jury trial, respondent Richard Lee Owen, II was convicted in the Circuit Court of St. Joseph County, Indiana, of Attempt to Commit a Felony While Armed. On direct appeal, the Supreme Court of Indiana affirmed. Owen v. State, ___Ind.___, 381 N.E.2d 1235 (1978). Owen filed for habeas corpus with the United States District Court for the Northern District of Indiana, also seeking an evidentiary hearing on his claim of jury misconduct. The court denied the request for a hearing and

refused to grant any relief. (A. 17-30). The Seventh Circuit reversed in part, ordering an evidentiary hearing (A. 1-11). The State has now petitioned for certiorari.

Facts

During the course of the trial, juror Mary Tolley reported that she had received a threatening phone call at her home. The caller stated: "God damn you, honky." "You better not testify." "We have a contract out on you. We are going to get you. We are going to get you." The trial judge held an in-camera hearing with Mrs. Tolley, and prosecuting attorney, and Mr. Owen present. The juror indicated that she believed it was serious, that she feared for her life, and that the caller's voice made her believe that it was a black man. Upon further questioning, Mrs. Tolley stated that she was worried because the black man who was sitting at the defense table with Mr. Owen had been watching her throughout the trial and had been smiling at her.

The judge reminded Mrs. Tolley that there was no way of knowing the source of the threat, and inquired whether she could still be fair and impartial. He decided that she could be, admonished her that her decision was to be based on what she heard in the courtroom, and that she was not to disclose the threat to others. She remained on the jury, over Owen's objection.

After the verdict was returned, Public Defender Anthony Luber, whom Judge Montgomery had appointed to be available as a consultant to Owen, directed his intern Patrick McManama to telephone the jurors. He did so, using a carefully structured and limited set of questions. The answers disclosed that Mrs. Tolley had, during deliberations, informed at least two other jurors of the threat. Upon Owen's motion, and over the state's objection, Judge Montgomery held a hearing on alleged juror misconduct. Although Mrs. Tolley was subpoenaed to appear, she submitted a medical excuse. The judge ordered the hearing to continue, agreeing that the parties could make arrangements to depose Mrs. Tolley.

Juror Yarger testified that she was vaguely aware that some juror had been contacted during the trial.

In the absence of witness Tolley, respondent Owen offered the testimony of investigator McManama. McManama testified that he had contacted eight of the jurors, asking them about their knowledge of the threat. He reported that Mrs. Tolley admitted she had informed two other jurors of the threat. She stated to him that she told the two jurors who were "holding out" during the last day of deliberations. Of the other jurors questioned by McManama, two told him they knew of the threat, two knew nothing about it, and four told him they had inferred that someone had been threatened.

After a short recess, Judge Montgomery concluded the hearing, saying the testimony was hearsay and invaded the province of the jury. He refused to hear any more. Owen then renewed his request that a deposition of Mrs. Tolley be arranged. That request was also denied when the judge stated: "I'm not going to let that happen. You can take that up, too." Owen made an offer to prove, indicating that if Mary Tolley testified, she would say that during the deliberation she discussed the threat with two jurors who were "holding out."

REASONS FOR DENYING CERTIORARI

Permitting Use of Juror Testimony to Show That Extraneous Prejudicial Information Reached the Jury Does Not Conflict with Holdings of the Indiana Supreme Court and is Mandated by the Sixth Amendment in this Case

The Seventh Circuit found in the case at bar that the record revealed "well-founded allegations" that an extraneous influence reached the jury. (A. 6). In light of this, the court ordered an evidentiary hearing to fully litigate the charge, including the testimony of jurors. Use of juror testimony under these circumstances does not conflict with key Indiana Supreme Court decisions on the issue and is mandated by the Sixth Amendment.

On direct appeal of this case, the state court gave the issue of juror misconduct little attention. Owen v. State, ___Ind.___, 381 N.E.2d 1235, 1241 (1978). Its holding was based on the Indiana rule which parallels

part of the Federal Rule of Evidence 606(b): juror testimony cannot be used to impeach a verdict where there is no evidence of prejudice through extraneous influence. Critchlow v. State, 264 Ind. 458, 346 N.E.2d 591 (1976); Wilson v. State, 253 Ind. 585, 255 N.E.2d 817 (1970). The court did not consider the constitutional violation involved and to that extent disregarded its own previous decisions.

If this were a civil action, the Indiana Supreme Court, considering the issue carefully, would probably have barred the use of juror testimony even to establish misconduct. See, e.g., Anderson V. Taylor, 154 Ind. App. 217, 289 N.E.2d 781 (1972); Jessop v. Werner Transportation Co., 147 Ind. App. 408, 261 N.E.2d 598 (1970). In Estate of Brunson v. White, 157 Ind. App. 211, 299 N.E.2d 186 (1973), the appellate court went so far as to expressly disapprove of that part of Federal Rule of Evidence 606(b), which would permit juror testimony about extraneous influences even in a civil action. In a civil action where there is no countervailing consideration, this strict Indiana rule may be justified to prevent juror harassment and protect the jury system. It would be binding on a federal court.

The Petitioner emphasized in its brief that a state court's ruling on an evidentiary question is binding on federal courts in habeas review, even if the ruling is erroneous under state law. (Pet. for Cert. 8). However,

when that ruling results in deprivation of constitutional rights, the federal court is not bound, but must determine whether the constitutional error was harmless. See Monk v. Blackburn, 605 F.2d 837 (5th Cir. 1979), cert. denied, 100 S. Ct. 1326 (1980); Butts v. Wainwright, 575 F.2d 576, 578 (5th Cir. 1978). The presence of an extraneous influence in the jury room is presumptively prejudicial and violates the Sixth Amendment. Remmer v. United States, 347 U.S. 227, 229 (1954), appeal after remand, 348 U.S. 904 (1955), appeal after subsequent remand, 350 U.S. 377 (1956); United States ex rel. Tobe v. Bensinger, 492 F.2d 232 (7th Cir. 1974); United States v. Rakes, 74 F. Supp. 645 (E.D. Va. 1947). Therefore, the federal courts must closely examine the impact of the Indiana Supreme Court's use of the rule against juror testimony.

Such an examination shows that Indiana's rule barring juror testimony in criminal cases is not absolute and the holding in the case at bar was erroneous under state law. There are numerous cases condemning attempts to use juror testimony or affidavits when there is no evidence of an extraneous influence. See, e.g., Critchlow v. State, 264 Ind. 458, 346 N.E.2d 591 (1976); Wilson v. State, 253 Ind. 585, 255 N.E.2d 817 (1970). The rule appears to change, however, when extraneous influence is suggested, presumably because the Sixth Amendment is implicated.

In Gann v. State, 263 Ind. 297, 330 N.E.2d 88 (1975), the Indiana Supreme Court reviewed allegations of misconduct involving out-of-court juror conversations with the bailiff and waitress, and the presence of notes in the juror room. The court affirmed the conviction because no prejudice was shown, but in reaching this decision, it considered evidence which was presented through the testimony of eight jurors. Id. at ___330 N.E.2d at 91. Although the Gann court did not specifically allude to the constitutional right which may have been violated, it did analyze the case in terms of the potential for prejudice or harm to the accused. Thus, Gann suggests that in a criminal case the normal rule is relaxed because of the constitutional rights involved.

Grigsby v. State, ___Ind.___, 371 N.E.2d 384 (1978), also shows that Indiana evidence law is not a bar to juror testimony where prejudice is shown. In Grigsby, two jurors visited the scene of the crime. This evidence was presented in the form of two affidavits -- one from a juror and one from defendant's attorney about a conversation with a juror. Addressing defendant's claim that his right to a fair trial was violated and that he was entitled to a new trial, the court noted that a new trial would be required only if the defendant was prejudiced by the unauthorized evidence. In applying that standard, tne Supreme Court of Indiana did examine the two affidavits,

including the juror's. Because they did not show prejudice to the defendant and the observations made at the scene were merely cumulative of evidence already presented to the jury in court, a new trial was not required.

Like Gann, Grigsby shows that the Indiana rule is not absolute. The Supreme Court stated in Grigsby, "There is no prejudice shown which would cause an exception to the rule against juror impeachment by affidavit. The trial court considered the affidavits and did not find cause for the granting of a new trial." ___Ind. at ___, 371 N.E.2d at 383. In contrast, there is prejudice caused by the extraneous influence in the case at bar. Short of the actual appearance of a threatening third party in the jury room, it is hard to imagine a more heinously prejudicial influence on a jury than knowledge that one member of that body was threatened. Even under state law, therefore, Owen should have been entitled to use the testimony of Mrs. Tolley. If the Indiana Supreme Court decision is read to imply a contrary state rule, that rule would work an unconstitutional injury on Owen and entitle him to habeas corpus relief.

Whatever the Indiana rule might be, "the sixth amendment guarantee of a fair trial to a criminal defendant injects a constitutional element into the evidentiary question." Tobias v. Smith, 463 F. Supp. 1287, 1289 (W.D.N.Y. 1979). If in fact the Indiana rule absolutely bars juror testimony, then Owen is absolutely barred by that rule from proving that his constitutional rights were

violated. Such a result cannot be tolerated. As the Second Circuit noted in Owen v. McMann, 435 F.2d 813, 820 (2d Cir. 1970), cited by the Seventh Circuit (A. 7), if this were true the federal court "would be obliged to disregard a state evidentiary rule preventing what in this case is the only method of proving that the defendant has been denied due process by the jury's consideration of extra-record facts."

The evidentiary approach taken by the Seventh Circuit in this case, applying Federal Rule of Evidence 606(b), see A. 7, best preserves the respondent's rights. In United States v. Thomas, the court approved the rule

> that a juror's testimony or affidavit shall be received when it concerns "whether matters not in evidence came to the attention of one or more of the jurors, under circumstances which would violate the defendant's constitutional right to be confronted with the witnesses against him.

463 F.2d 1061, 1064 (7th Cir. 1972), quoting American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, § 5.7(c)(Approved Draft 1968). A comparable standard has since been embodied in the Federal Rules of Evidence, Rule 606(b). Under this rule, the testimony of Mrs. Tolley would show that she carried a high prejudicial and extraneous influence into the jury room. She, and the person who made the threat,

in essence became witnesses against petitioner Owen at a highly sensitive time in the deliberations when he could not confront them.

In summary, the Seventh Circuit's ruling does not conflict with Indiana Supreme Court decisions on the use of juror testimony to show prejudice caused by extraneous influence. The ruling, permitting such juror testimony, is required to protect respondent's Sixth and Fourteenth Amendment rights.

CONCLUSION

Because petitioner cannot establish a reason for this Court to exercise its discretion to grant review, the petition for certiorari should be denied.

Respectfully Submitted,

MARCIA L. GIENAPP
Attorney for the Respondent
Appointed by the Seventh
Circuit pursuant to the
Criminal Justice Act
Valparaiso University School of Law
Valparaiso, Indiana

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CERTIFICATE OF SERVICE

I hereby certify that on Oct 12, 1981, two copies of the above brief were served on David A. Arthur, Deputy Attorney General for the State of Indiana, 219 State House, Indianapolis, Indiana, 46204, attorney for the petitioner, by depositing them in the United States mail with sufficient first-class postage attached.

Marcia L. Gienapp

MARCIA L. GIENAPP
Attorney for Respondent
Valparaiso University
School of Law
Valparaiso, Indiana 46383
(219)464-5420

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No. 80-1659

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondent Richard Lee Owen, II, by counsel Marcia L. Gienapp now moves for permission to proceed in forma pauperis. Leave to so proceed was granted in this habeas corpus action by the District Court for the Northern District of Indiana and by the Court of Appeals for the Seventh Circuit. Marcia L. Gienapp was appointed as counsel by the Seventh Circuit under the Criminal Justice Act of 1964, as amended.

Respectfully submitted,

Marcia L. Gienapp

MARCIA L. GIENAPP
Valparaiso University
School of Law
Valparaiso, Indiana 46383
(219)464-5420

I hereby certify that on April 16, 1981, one copy of the above motion was served on David A. Arthur, Deputy Attorney General for the State of Indiana, 219 State House, Indianapolis, Indiana, 46204, attorney for the petitioner, by depositing them in the United States mail with sufficient first class postage attached.

Marcia L. Gienapp

MARCIA L. GIENAPP
Attorney for Respondent

No. 80-1659

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STATEMENT OF FILING

I, Ivan E. Bodensteiner, state as follows:

1. I am a member of the Bar of this Court.

2. Three ~~Two~~ copies of the Respondent's Brief in Opposition to the Petition for Certiorari were placed in the United States mail on April 16, 1981, with sufficient first-class postage attached, properly addressed to the Clerk of this Court.

Ivan E. Bodensteiner

IVAN E. BODENSTEINER
Valparaiso University
School of Law
Valparaiso, Indiana 46383
(219)464-5395

Subscribed and sworn before me, a Notary Public, in and for Porter County, Indiana, this 16th day of April, 1981.

Nancy L. Kokesh

NOTARY PUBLIC

My Commission Expires July 6, 1984